92-157

Supreme Court, U.S.
FILED
FEB 10 1992
OFFICE OF THE CLERK

UNITED STATES SUPREME COURT

February term, 1992

William Bernal,

Petitioner,

—v.—

Korean Air Inc,

Respondents,

PETITION FOR A WRIT OF CERTIORARI AND OR MANDAMUS TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM BERNAL
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QUESTIONS PRESENTED

1. Was the decision below incorrect in rejecting the standards issuing a Order of dismissal of the case persuant Rule 41(b) for not attendance of the Petitioner at the supposed Jury Selection when all circumstances and previous hearing lead to indicated intimidation?

2. Is there a second standard in the Judicial System to dispose justice in legal and justifiability case, when the interest of the Public, Petitioner, and Children is controlled by unreasonable capricious, when the harm is progressive and accumulative.

3. Is a any difficulty that a simple Jury Trial solve the below case when, the Natural, Bible, and Constitutional Law dictates the logic remedy? (*Mayse v. protective agency* 772 F. Supp 267 W.D.N.C. 1991)

4. Isn't unfair to The Petitioner, and the Third Party to be part of this action, when Korean Air and Petitioner are the only material and tangible protagonists in the case bound by contract?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM L. BERNAL,
PRO-SE *Petitioner*,

v.

KOREAN AIR INC et al,

Respondents

PETITION FOR A WRIT OF CERTIORARI AND OR MANDAMUS TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner William Bernal (ProSe) respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on November 12, 1991.

OPINION BELOW

This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court. (Note from the court of Appeals)

JURISDICTION OF THE SUPREME COURT

The order of the United States Court of Appeals for the Second Circuit was entered on November 12, 1991.

Petitioner's timely petition to the Second Circuit for rehearing with a suggestion for rehearing 'in banc' was denied on December, 12, 1991. Title 28, United States Code, Section 1651(a) and Rule 11 of the United States Supreme Court Rules confer jurisdiction on this Court to review the order in question by writ of certiorari and Writ of Mandamus.

CONSTITUTIONAL AND STATUTORY INVOLVED

This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdictions the equal protection of the laws."

STATUTES INVOLVE

Constitutional first, fourth, fifth, six, seven, nine and fourteen Amendments, Civil Rights Act, 42 USCS@1983, 1361, 1391(3) of Code 28. (See Haphrey v. Limm County 924, f2d. 49 USCA 1374(b) Federal Aviation Act. 1958 & 404(b).

PRELIMINARY STATEMENT

THIS RISE OF PRIMA FACIE TORT: DUE TO A CONSENTED, INTENTIONAL, WILLFULLY, KNOWINGLY BREACH OF CONTRACT.

The above-entitled action was brought by the plaintiff William Bernal (pro-se) with a service of a summons and Endorced Complaint. The defendant KOREAN AIR September 6, 1988. In the Civil Court of the City of New York, County of Kings. Copies court copies filed.

All claims asserted and proved in this action, and any and all other claims against the defendant, which are based on or could be based on, or could arise from any of the matters alleged in plaintiff's complaint, as amended and supplemented, regardless of the legal theory on which they are based, had been dismissed by the court with prejudice.

STATEMENT OF FACTS

Plaintiff first began to experience abnormal psychotics conditions while was forced to stayed in Seoul Korean right after left the portion of Korean Air, flight between Seoul and Bangkok Thailand on April 1, 1988.

By the said time Plaintiff-Appellant, requested, offered to be sit in alternative available flights, bound to U.S.A. The denied was emphatically, stated by Korean clerks in Bangkok as a "breach of contract;" despicted of warnings of a lawsuit otherwise, instead, the Petitioner was in full sense of the word ABDUCTED ILLEGALLY to Korea. (1201 of title 18.) Ironical was with visitors paid visa.

> Upon any breach of contract, the defendant is liable for whatever damages follow as a natural consequences and the proximate result of his conduct, or which may reasonable be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of breach of it. (Moore's Manual #4.)
>
> Mahaney v. Air France 474 F. Supp 532 (1979).

CONSEQUENTIAL DAMAGES RULE UNDER THE POINT OF VIEW, THE DELAY CONSTITUTES A BREACH OF CONTRACT ALSO THE RULE IN THIS JURISDICTION IS THE TRADITIONAL RULE THAT DAMAGES ARE NONCOMPENSABLE UNLESS THEY ARE THE NATURAL AND FORESEEABLE CONSEQUENCES OF DEFENDANT'S BREACH. See Jamil v. Kuwait Airways Corp. 773 F.Supp. 482 (D.D.C.1991).

Despite the fact or refused to have anything to eat in the flight on April 10, 1988, Bangkok to Seoul Korea, when plaintiff used the plane's lavoratory one, disposable toothbrush (proof envolture package) produced a hot sensation and swollen tongue, and trigger into those abnormal conditions; as like a general patterned from thereon, reactivated or stimulated and substain them, as soon as he had any alcoholic beverage.

Plaintiff experienced further severe hallucinations on April 13, 1988, when the shades in aircraft were lowered to show the in-flight move "just follow the meal and drinks were served" consequently that induced the bizarre behavior of attempted to open the aircraft exit door, and the scissors attack.

ASSAULT AND BATTERY

Once unarmed and in the floor, cabin attendants jumped at the plaintiff and proceed to kick and punch at him, and was handcuffed his hands and bound his feet into a seat; he was under continue observation and re-tied the rope and handcuffs holding him for the remainder of the flight when he try screaming due to the intense pain, they attempted "to place a towel around plaintiff's mouth." This occasioned a quite controversial as follows:

Plaintiff put in consideration and transport anyone's mind to the following scenario: to be hand-cuff and rope tied, in squated position, compress torax, breathing at high rate through the mouth due to brain syndrome and extra excitement, and to obstruct this vital process with the so call towel was the "mortuis ultimun ipso facto"; and the only recourse of self-defense was to spit WHOM attempted to place that towel in the plaintiff's face; this trigger the impulsive and diligent young steward TO PROCEED TO STAB THE PLAINTIFF with a skewer.

The defendant's main argument of contention, concentrates in the question to distinguish between "rag vs. towel" that implies:

The court has to assignated a master in English phylogist as well textile experts to consult in this matter; when, after all, in separated attempts "both rag and towel" were used to stuff them inside of plaintiff-appellant's mouth, or gag him, even although, the so call towel, in function and the real used is a table cloth, which later on was found it in Plaintiff's luggage like a souvenir.

THE RATIONALE OF THE MATTER lies, in the fact that "around of the mouth" doesn't have hoocks or supporters, and either one whatever you want to call it, would produced a fatal results under that circumstances; besides this is not matter of semantics, but pure strictly proven fact and meaning right out of the context of all cabin assistants affidavits (Court filed).

INTENTION: Doesn't matter what was the intention, if were malicious, or accidental, either one is LIABLE under the law, one can be considered as assault and battery the other as, or MEDICAL MALPRACTICE or both in this particular issue; without to be pretentious, Petitioner considers this particular, incident as academic and evidential accomplishment of: hundreds of years of logic and jurisprudence vs. A neophyte in this matters, Who crack the issue or bring the attention to it in this matter, as well as how Petitioner interpretation to the defendants documentation raised a new issues of fact.

SPECIAL OBSERVATION OF FACT

The respondent has to make notice of great deal of misunderstandings, wrong interpretations, in which Korean Air is been use at their own advantage creating and polarizing, a correct clear abuse of discretion or usurpation of judicial power by the trial court.

1) In Korean Air's allegation contained in paragraph number 4. That, allegation is based of statements, and accusations at the moment of confusion, attributed to the petitioner's state of mind and crazy behavior in the airplane and in the emergency room of Alaskan hospital; this is not a contradictory with the original statement introduced like RES GESTARE evidence with the title "Plaintiff state of mind" in the Plaintiff's Memorandum at Law.

PROOF OF CLAIM

MORBID TORTURE SEX HARASSMENT

1) In addition of such statements product of the Petitioner's stated of mind was a serious untruely self-incriminatory pronouncement, (what it costed to prove the contrary) it was to screaming and mumbling "I am a Homosexual," when he was removed from the airplane in the emergency Alaskan stop.

BUT, this self-incriminatory statement or shocking impact, was origined from the Korean's cabin attendants and employees, false accusations, innuendos and connotations of 20 minutes. See J.W. Kim's cabin report annexed to Notarial Certificate Affidavit and in support of Motion for summary Judgement. Sworn, notarized and Court filed.

Quotation:

> For a while, about 20 minutes passed, he was seated in silence and motionless. But he made a violent riot and shouting in his tied seat.

At this particular lapse, of time, the Korean employees surrounded the Petitioner-plaintiff and in, Korean, English, and finally in Spanish, shouted accused of such detrimental and repercussionary accusation with torture techniques upon him, while they were exerting strength to the ropes, inflicting the damages and injury in the wrist and ankles (See medical record). Due to the Petitioner's mental state he was susceptable to believe anything, capture remark been told at him.

IMMEDIATE HOSPITAL TREATMENT

Plaintiff-Petitioner was admited to the Providence Hospital in Anchorage where he was treated overnight and then transferred to the Alaska Psychiatric Institute in Anchorage where he was treated for the evidentiary stabbed laceration on his leg, Acute Renal Failure, Hypocalemia, Acute psychosis, and Acute rhabdomyolysis for approximately eight days.
While at Providence Hospital, plaintiff suffered further severe conscious concerns about of that accusations in addition of hallucinations.

FURTHER MEDICAL PROBLEMS

By the reason of the said acts and injuries, further tests and treatment were perform in the Presbyterian Hospital in New York City, plaintiff-petitioner was diagnosed with "Arthralgia," (arthritis of the cranial joint,) neuralgias and general impredisposition in results there is a new consequential, "Brain Damage" that will shorts his lifetime. (See Ref. Behavioral Sciences & the Law, vol. 3, No. 2:165-175 by Robert A Merrick, (1985.) Brain and Language 37,419-439 (1989.) and sequence numbers. & Cognitive Psychology 22, 111-142 (1990.) and sequence. This is scientific medical sequential of postraumatic stress syndrome, which projects a progressive anomalies with symptoms, to end in physical brain injury.

COURTS AFFIRM

On the sixteen day of March, 1990, The Honorable Arthur Spatts at the oral argument, (requested, demanded by Korea Air) Fred's Guarino took the transcript, among of the presiding judge observations, referred to the vexatious conduct of the defendant, in reference to the case when was in arbitration stage, confirmed the circumstantial elements of this incident, making a reference of the physical torture, at that particular moment after the Petitioner was restrained; and this new relevant fact, would pictures

an accurately more but not less, the typical middle age process inquisitional chambers, practice for political and religious motives or persuation not only in Europe but in Japan, China, India, etc. "Confess or and turn the rope." (See also St. Luke 23,63-65).

CONSEQUENCES OF STIGMA AFFECTS INNOCENT PARTIES

Simultaneous and gradually Petitioner's apartment was invaded by the neighbor children of ages from 5 to 16, for used like a club, and gathering meeting. The only verbs that they know to conjugate quite well are: "We are hungry and give me" their favorite topic of conversation and its expression is about sex. Besides, is been implied and imposed that the Petitioner has to represent them in school, hospital, etc. But came the case in doing this type of favor, officials of this institutions question and get suspicious that a "friend" instead of the parents take care of this matters, such doubts are oriented in the sense that there is sexual relationship, between the petitioner and the children. For the Petitioner is psychological flash-back that relates with the incident mention it above. Consequences: three kids of ages 10, 12 and 16 years old, the first two were band to get in the school and stay in the street for two years as truants, the third one after had a conflict with his parents whom induced him to distribute and sell drugs had to yield, and today is a fully armed drug dealer and hit man in the trade.

POST-DEVELOPMENTS

Thereafter and as soon as Petitioner was release from hospital Korean agents, employees; assuming, of the incoming lawsuit from part of the Petitioner, the said agents, or employees, were moving freely and acting without U.S. notice, trying to influence and undermine the case. In view of this: petitioner thought that was proper to alert the State Dept. because thier foreign status and activities. (See current news of resurgent of Symoun Moon movement.) In addition by decieve act and coercion they made signed a waiver of indemnity document at him before returned the final stage of returned to New York.

PETITIONER BACK HISTORY

2) Since childhood Petitioner was very interested in Cosmology and fascinated with the events and politics of the two world wars. It is matter of fact that the first reading texts were Selection Reading Digest and American publications most them dedicated to report the war scenaries, supplemented by the short wave transmissions, B.B.C. and Radio Berlin, grew up with a great desire and wishes for a future opportunity to visited all this historical places, because was impossible to make during the time in the U.S.A. Military Service; for that reasons Petitioner used Korean Air to go at them. In consequence that would be the Korean Air's attorneys answer to their "Second Affirmative Defense" repeated and alleged in the say documentation:

> "Plaintiff's alleged injuries and damages were cause in whole or in part by the culpable conduct of plaintiff and, therefore, any damages recoverable by plaintiff must be reduced in proportion to plaintiff's culpable conduct." So the culpable conduct of plaintiff is the GENUINE AMERICAN PATRIOTISM.

Back home from frequent trips, Petitioner reported to veteran family and friends, of the annotations at the memorial plates, cemetaries, formal concentration camps; left by their Army Forces Divisions at those historical places, which they were part in war actions.

In addition petitioner build up enormous computer file, with science, all kind of technical military information, (is possible that might be were used for university presentation papers and thesis). In results, the system turns to be very useful, because provides information regarding, who, time, date or presence of intruders into it and its files.

And after all, until this time, resulted finally that Petitioner's complaint to the State Dept was investigated, because resulted to be the big scandal of COMPUTER VIRUS well mentioned and discussed in the first week of November, 1988. Obviously due to the concurrent of this case, the name of the party was substituted and adjudicated to Robert Morris.

SPECULATIVE ISSUES OF FACT

This proves and presents great issues of speculation, of hypothesis and puzzles who, what motives to Korean Air believes, the suggestion that the petitioner was the right party, and why somebody else might took the heat, blame and the responsibility.

CABIN ATTENDANTS CONDUCT

The said consequences and responsibilities, accident, injuries resulting to Petitioner-plaintiff therefrom were caused solely and wholly by misconduct of cabin attendants and with consent and participation of their own supervisors of the defendant as hereinafter alleged and without any negligence on the part of the plaintiff or anybody else contributing thereto.

In contrast, after the authorities began to investigated the computer crisis, and the above case, agents, employees, clerks and Judges, were carrying superior orders. Petitioner does not have complaint or personal misconduct, or mistreatment from their part, at contrary he can proves that have been compassion and sympathy, furthermore in repeated occasions Petitioner's life was save, and prevented injury, of sure danger. No matter how the case is looked always has been in result, beneficial to the petitioner.

In the case of *Mississippi Chemical Corp. V. Swift Agricultural Chemicals Corp. v. Swift Agricultural Chemicals Corp.* 717 F.2d 1374 (1983) the court opinions and determination is approximate applied to the case, the difference is that one is market commodities, the other is human being lives.

ARGUMENT

In general terms the Court has not matched with the evidence, the defendant's Motion to Dismiss the action pursuant to Federal Rule of Civil Procedure 41(b) for supposed failure of plaintiff to prosecute the action and failure of plaintiff to comply with the Order of District Court for trial. Petitioner argument or explanation is the following:

a- Plaintiff has to says that the defense Korean Air, has failed from hereto establish its defense or points of contentions, has not present a "forum of litigation" at all. Contrary to the Rules of Federal Procedure, Rule 16 never answer plaintiff's Law Memorandum, and cloud the real issues of fact. See *Gentile vs. County of Suffolk*. 926 F.2d 142 (2nd Circ. 1991.) and *Ohio Edison v. Ohio Edison Joint Council* 771 F. Supp 1476 (N.D. Ohio 1990).

Instead, to frame up and construct the agenda for trial, Court and defendant, joint in mutual conspiracy against the plaintiff. (See *U.S. v. Alkins* 925 F.2d 541 (2nd Circ. 1991) Fed. R. Evid. 801(d)(2)(e). The aforesaid combination and conspiracy consisted of a continues misuse the process. Among or one this acts was to manage to remove the Venue, of the 40 miles away, and a sense of threat connotation if he had attended over there any schedule court further meeting.

Subsequent the Jury Trial Judge asked explanation why, the Petitioner did not attend the supposed Jury Selection, He was satisfied by the Petitioner's explanation, even help to perfect the transfer, to the Court of Appeals, and vacated His court with a Judgment with no opinion. The following is in excerpt of the Plaintiff response to the Judge's request:

To the Honorable, Judge of the United States District Court for the Eastern District of New York. At the NOTICE OF SETTLEMENT OF ORDER OF KOREAN AIR, defendant, meeting at the day of January 14, 1991.

The plaintiff, prose in the above entitled action, has failed to comply with said order of selection of jury dated for January 4, 1991, for the following reasons:

a- Plaintiff has to says that the defense Korean Air has failed from hereto to establish its defense or points of contention, has no present a "forum of litigation" at all. (No elements of surprise at Jury Trial.)

b- For this particular action, no either Court or defendant respond or answer motions and notice in reference, to this issue.

c- Korean Air alleged that they Summons a witness, contrary to the 613(a) F.R.E. The plaintiff has to examine or, at least to know what the defendant intends to prove with the witness; and action for the Petitioner-Plaintiff presents his own witnesses; the whole thing became unilateral and only the defendants rights prevails.

d- Plaintiff is aware to the fact, that this Court the Jurors selection, takes place Fridays and not Mondays.

e- Plaintiff was notify with anticipation of adverse or reverse verdict in case of jury decision was favorable to the him.

f- In so call pretrial hearing, the Honorable, Arthur Spatts brought the attention and preclude to proceed by Jury Trial due to the fact that the representation of the plaintiff by attorney was out of question, and the speech impedement problem. See *Savage v. Estelle* 924 F2 1459 (9th Circ. 1990).

g- When Plaintiff began to bring the attention of the consequences of the derogatory remarks of the Korean Air's stewards and the responsibility upon the innocent parties; that was unsuspected surprises, but immediately was shut off, with the comment that, was Plaintiff's responsibility.

After the July, 5, 1990, conference, the fact or moving the Court from Brooklyn to Uniondale (40 miles) by, interpretation of plaintiff co-workers and acquaintance was an ample warning if Plaintiff had planned to go to Uniondale.

But in general, never was discussed, or assembly and set the agenda or notify an intention for a Jury Trial. For all those, prejudicial harm errors, Petitioner has the option or to be for consideration of dismissal effects of Rule 41(b) and instead to granted at least as like TRIAL DE NOVO.
See Lytle v. Household Mftr. 58 USLW 4341.

Petitioner was entitled, by default, and by discretion, beneficiated by implementation of the Rules of Procedure, or else to sanction with Rule 16(f), 37, 11, according of the Code 28 section 1927. 28 1608(e) against KOREAN AIR and his attorneys. See Nelson v. Monroe Regional Medical Center 925 F.2d 1555 (7th Circ. 1991).

The determination is unsupported by the evidence, is contrary to evidence, and is against the weight of the evidence. The determination is unsupported by and contrary to the findings of fact heretofore made herein which are inferentially reaffirmed by the recitals in the decision, determination, and order, dated November 12, 1991.

REASONS FOR GRANTING THE WRIT

Petitioner contends that the order of severance, which directed the individual trial one defendant, and without consideration or the type of evidence and serious implications on which Korean Air intends to rely, prevents any effective trial of the civil and institute both and abuse of judicial power and abnegation of judicial duty.

1- The relief herein sought was not available, and there was not adequate remedy, in the Court of Appeals or any other court other that this Court.

2- To follow the jurisdictional guide lines stablished by the court, in reference to all claims made to Korea Air, begining with the case of Flight 007. (See New York Law Journal Page 1 and seq, of March 5, 1992.) Quote: "On Dec. 2, 1991, 99 months and a day after the crash, the U.S. Supreme Court cleared the way FOR TRIAL of the 137 remainging claims." (See Chan v. Korean Air Lines 108A S.C.R. 1288(3). Due to the correlations of: Same defendants, circumstances, and attorneys, the above case has to be onmibus, considered, view and decide by this court.

3- By special executive order of the president of the U.S.A. Jorge Bush, supplemented by the opinion of the cabinet and support by the media for, a Judicial Reveiw in all Civil Rights Cases; this is motivated by the occasion of the incident of Mr. Rodney King, follow by the riots of the Los Angeles.

CONCLUSION

For the foregoing reasons, petitioner prays:

That a writ of mandamus issue from this Court directed to the Honorable United States Court granting: TOTAL THIRD PARTY DROP OR DISMISSAL, AND ORDER FOR A JURY TRIAL WITH AND ONLY, KOREAN AIR.

In addition Korean Air's along this litigation introduce at first a third party, but fails to state a cause of action on it. At the same time at the oral judgment of March 16, 1990 the attorney denied, and question the petitioner's credibility respect of the existance or third party. This fulfill the dismissal conditions according with Weinstein, Korn and Miller, and their counter part of Rules CPLR Rule 3211 (a)(7).

2. That petitioner have such additional relief and process as may be necessary and appropriate in the remisses, and that would secure a FAIRNESS judicial proceeding.

Dated: March 6, 1992

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of November, one thousand nine hundred and ninety-one.

Docket No. 91-7260

PRESENT

HON. JAMES L. OAKES,
Chief Judge.

HON. J. EDWARD LUMBARD,
and
HON. FRANK X. ALTIMARI,
Circuit Judges.

WILLIAM BERNAL,
Plaintiff-Appellant,

— v. —

KOREAN AIR LINES,
Defendant-Appellee.

ORDER

William Bernal, *pro se*, appeals from an order of the United States District Court for the Eastern District of New York, Arthur D. Spatt, *Judge*, dismissing his personal injury claim, with prejudice, pursuant to Federal Rule of Civil Procedure 41(b) for failure either to prosecute or to comply with the district court's order. For the reasons stated below, we affirm.

Appellant, in essence, argues that the district court's dismissal order constituted abuse of discretion. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1982). A review of the facts indicates that the district court went to great lengths to inform appellant of his trial date and of the consequences of his failure to appear. On October 22, 1990, appellant was informed that the trial would begin on January 4, 1991. On January 2, 1991, the district court's courtroom deputy telephoned appellant to remind him of the upcoming trial. At that time, appellant stated that "he would not come to (the courthouse in) Uniondale and he did not care what happened with the case." Appendix 6. To ensure that appellant was fully informed of the trial date and the consequences of failing to appear, the court, on January 2, also sent Express Mail letters to appellant's residence and place of work. The letters noted that dismissal might result if appellant failed to appear. Yet, on January 4, appellant failed to appear at trial and he offered no explanation for his absence. The district court could properly conclude from appellant's earlier statement and his unexplained absence at trial that appellant did not plan to go forward with his suit.

Affirmed.

/s/ JAMES L. OAKES
Chief Judge

/s/ J. EDWARD LUMBARD
Circuit Judge

/s/ FRANK X. ALTIMARI
Circuit Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CV 88-3042

February 20, 1991

WILLIAM BERNAL,

Plaintiff,

—against—

KOREAN AIR LINES,

Defendant.

JUDGMENT

An Order of the Honorable Arthur D. Spatt, United States District Judge, have been filed on February 12, 1991, dismissing the action with prejudice and without costs, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant; and that this action is dismissed with prejudice and without costs.

ROBERT C. HEINEMANN
Clerk of the Court

By /s/ JOSEPH D. TALIA
Deputy Clerk-in-Charge

Dated: Uniondale, New York
February 20, 1991

/s/ ARTHUR D. SPATT
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 91-7260

WILLIAM BERNAL,

Appellant-Plaintiff,

—vs—

KOREAN AIR LINES,

Appellee-Defendant.

NOTICE OF MOTION FOR STAY AND COPYRIGHTS

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*
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OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*
Christopher Carlson
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Has consent of opposing counsel:

A. been sought?	☐ Yes	☑ No
B. been obtained?	☐ Yes	☐ No
Has service been effected?	☐ Yes	☐ No
Is oral argument desired?	☐ Yes	☐ No
(Substantive motions only)		

Requested return date:
(See Second Circuit Rule 27(b)
Has argument date of appeal been set:

A. by scheduling order?	☐ Yes	☐ No
B. by firm date of argument notice?	☐ Yes	☐ No

C. If Yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has requested for relief been made below? *(See F.R.A.P. Rule 8)*	☑ Yes	☐ No
Would expedited appeal eliminate need for this motion?	☐ Yes	☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard?	☐ Yes	☐ No

Judge or agency whose order is being appealed:
COURT OF APPEALS (Judges en Banc)

Brief statement of the relief requested:

To return to Jurisdiction and venue of the Court in order to obtain a judgment in favor the appellant-Plaintiff

By: *(Signature of attorney)* Appearing for: *(Name of party)*

/s/ WILLIAM BERNAL

Signed name must be printed beneath

William Bernal November 24, 1991

Date

Appellant or Petitioner:
☑ Plaintiff ☐ Defendant
Appellee or Respondent:
☐ Plaintiff ☐ Defendant

ORDER

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Filed Dec. 12, 1991
Elaine B. Goldsmith, Clerk

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

/s/ JAMES L. OAKES
Chief Judge

/s/ J. EDWARD LUMBARD
Circuit Judge

12-12-91 /s/ FRANK X. ALTIMARI
Date Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of June, one thousand nine hundred and ninety-one.

Docket No. 91-7260

WILLIAM BERNAL,

Plaintiff,

v.

KOREAN AIR LINES,

Defendant.

Mandate

A scheduling order in accordance with the Civil Appeals Management Plan of this Court having been entered therein, requiring the record on appeal, the appellant's brief and joint appendix to be failed on or before the dates on the scheduling order, also providing that the event of default by the appellant the appeal shall be dismissed forthwith and it appearing that the appellant has so defautled,

Upon consideration of the appeal herein it is ORDERED that the appeal be, and it hereby is dismissed.

ELAINE B. GOLDSMITH
Clerk

By: _____
Deputy Clerk, USCA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CV 88-3042

WILLIAM BERNAL,

Plaintiff,

—against—

KOREAN AIR LINES,

Defendant.

ANSWER TO AMENDED COMPLAINT

Defendant KOREAN AIR (incorrectly sued herein as KOREAN AIR LINES), by its attorneys Condon & Forsyth, answers plaintiff's Amended Complaint dated September 11, 1989 as follows:

1. Denies each and every allegation in the Amended Complaint.

FIRST AFFIRMATIVE DEFENSE

2. The Amended Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

3. Plaintiff's alleged injuries and damages were caused in whole or in part by the culpable conduct of plaintiff and, therefore, any damages recoverable by plaintiff must be reduced in proportion to plaintiff's culpable conduct.

THIRD AFFIRMATIVE DEFENSE

4. Plaintiff's alleged injuries and damages were caused by the negligence of parties other than KOREAN AIR and for whom KOREAN AIR is not responsible and, therefore, KOREAN AIR is not liable to plaintiff.

COUNTERCLAIM

5. This counterclaim arises out of the transaction and occurences alleged in plaintiff's claims for relief as set forth in plaintiff's Supplemental Complaint and therefore is compulsory within the meaning of Federal Rule of Civil Procedure 13(a).

6. On or about April 13, 1988, plaintiff was travelling as a passenger aboard KOREAN AIR Flight No. KE026 from Seoul, Korea to John F. Kennedy International Airport in New York.

7. Approximately three hours after Flight KE026 departed from Korea, plaintiff suddenly and without provocation or justification physically attacked and injured another passenger, Mr. Howard Kim, with a pair of scissors taken from a third passenger on board the aircraft.

8. As a result of plaintiff's attack on Mr. Kim, plaintiff was subdued and restrained by the KOREAN AIR cabin attendants and several passengers. After being restrained, plaintiff continued to verbally abuse and threaten the safety of the cabin attendants and passengers on board the aircraft. Plaintiff's continued disruptive, violent and threatening behavior constituted a serious threat to the continued safe and efficient operation of the flight, necessitating an unscheduled emergency landing in Anchorage, Alaska.

9. Upon landing in Anchorage, plaintiff was removed from the aircraft by the Anchorage Airport Police Department. The landing in Anchorage delayed the scheduled arrival of Flight No. KE026 in New York by approximately three hours.

10. As a result of the unscheduled emergency landing in Anchorage caused by plaintiff's negligent, reckless and illegal conduct, KOREAN AIR incurred substantial additional operating expenses for dumped fuel, airport landing fees and employee overtime pay in addition to the accompanying disruption of KOREAN AIR's business and flight operations and the loss of customer good-will caused by the three hour delay in Anchorage.

11. By reason of the foregoing, KOREAN AIR sustained damages in the amount of One Hundred Thousand ($100,000) dollars.

WHEREFORE, defendant KOREAN AIR demands judgment:

(a) dismissing plaintiff's Supplemental Complaint; and

(b) awarding KOREAN AIR damages in the amount of One Hundred Thousand ($100,000) dollars together with costs and disbursements of this action.

Dated: New York, New York
September 14, 1989

CONDON & FORSYTH

By: DESMOND T. BARRY JR.
A Member of the Firm

1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

Attorneys for Defendant
KOREAN AIR

TO: Mr. William Bernal
300 Jay Street
Brooklyn New York 11201
(718) 643-5851

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CV 88-3042

WILLIAM BERNAL,

Plaintiff,

—against—

KOREAN AIR LINES,

Defendant.

AFFIDAVIT

H.S. KIM, being first duly sworn, deposes and says:

1. I currently am employed as a Security Officer by defendant KOREAN AIR in Seoul, Korea. My business address is Box 864, 41-3, Suhsomoon-dong, Chung-gu, Seoul, Korea. I could testify competently as to the facts set forth in this Affidavit.

2. On April 13, 1988, I was assigned as the Security Officer on board Korean Air Flight No. KE026 from Seoul, Korea to New York. In this position, I was responsible for the cabin security of the flight. Several hours after Flight No. KE026 departed Seoul, I was advised by a cabin attendant that a passenger later identified to me as Mr. William Bernal had attacked another passenger with a pair of scissors. I, together with the Purser, several cabin attendants and two passengers seated in business class, attempted to subdue Mr. Bernal to prevent further injury to the passenger being attacked as well as the other passengers on board the aircraft. *Mr. Bernal violently resisted our attempts to subdue him* and attempted to slash and stab us with the scissors.

3. After finally subduing Mr. Bernal, I handcuffed his hands and bound his feet and we tied him into a seat in the business class section of the aircraft. After he was placed in the seat, I observed Mr. Bernal continue to struggle violently, and act in a very strange and threatening manner towards the cabin attendants and the other passengers. Mr. Bernal freed himself from the rope tying him to the seat *but we again subdued him,* tied him into the seat and then took turns holding him down for the remainder of the flight. Because of Mr. Bernal's continued violent behavior, the Captain made an unscheduled emergency landing in Anchorage, Alaska to remove Mr. Bernal from the aircraft. Mr. Bernal continued to struggle and act in the same strange and violent manner until the aircraft landed in Anchorage.

4. I am aware of Mr. Bernal's allegations that the cabin attendants attempted to force a benzene or gasoline soaked rag into his mouth and that a cabin *attendant stabbed him in the leg after he had been tied into the seat.* These allegations are not true. Mr. Bernal was not stabbed by a cabin attendant or any other individual on board the aircraft nor did anyone ever attempt to force a benzene or gasoline soaked rag into his mouth. *We attempted once to place a "towel" around Mr. Bernal's mouth because he was spitting at and attempting to bite the people around him.* Because of his violent reaction, however, we were not able to place the towel around his mouth.

5. Attached hereto as Exhibit "A" is a copy of the Cabin Report I prepared on April 13, 1988 concerning the incident as required by KOREAN AIR regulations.

HO SUN KIM

H.S. KIM

AFFIDAVIT OF MAILING

No._

IN THE SUPREME COURT OF THE UNITED STATES

Feb · term of 1992

WILLIAM BERNAL Petitioner,(Pro-Se)

vs

KOREAN AIR, Respondent.

AFFIDAVIT OF MAILING PETITION FOR CERTIORARI

AFFIDAVIT OF MAILING PETITION FOR CERTIORARI

William L Bernal, pro-se being duly sworn, deposes and says:

I am the petitioner of the above case. On July 21, 1992, at aproximated 1 p.m., I deposited in the mailbox at CADMAN PLAZA 271 of United States Post Office, a parcel pkg addressed to the Clerk of the Supreme Court of the United States, first-class postage prepaid, containing 40 copies of the petition for certiorari in the above-entitled case.

William Bernal
601 West 173 St N.Y.
(718)260-5140

Sworn before me this
the 21th day of July, 1992

Notary Public

GEORGE J. LOWE
Notary Public, State of New York
No. 24-4501407
Qualified in Kings County
Commission Expires Aug. 31, 1993

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
AUG 20 1992
OFFICE OF THE CLERK

No. 92-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM BERNAL,

Petitioner,

—v.—

KOREAN AIR INC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DESMOND T. BARRY, JR.*
CHRISTOPHER CARLSEN
CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

Attorneys for Respondent
KOREAN AIR LINES CO., LTD.

*Counsel of Record

QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the District Court's dismissal of Petitioner's Complaint for failure to prosecute and failure to comply with the District Court's Order to commence trial?

RULE 29.1 LIST

Korean Air Lines Co., Ltd. is a member of The Hanjin Group of Korea, which comprises companies under common management direction. The 24 affiliated companies of The Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuk Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Travel Information Service Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecommunication Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd., Co., Ltd.
Hanjin Heavy Industries Co., Ltd.
Femtco Shipping Co., Ltd.
Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation—SOGEKO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuk Foundation
Inha General Hospital

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-157

WILLIAM BERNAL,

Petitioner,

—v.—

KOREAN AIR INC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, KOREAN AIR LINES CO., LTD. (sued incorrectly as "KOREAN AIR INC" and hereinafter KOREAN AIR), respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the Order of the Court of Appeals for the Second Circuit which affirmed the District Court's dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute and failure to comply with District Court's Order to commence trial.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Second Circuit is not reported and is reprinted in the Appendix[1] hereto at 1a, *infra*.

The Order of the United States District Court for the Eastern District of New York (Spatt, J.) is not reported and is reprinted in the Appendix hereto at 3a, *infra*.

STATUTORY PROVISION INVOLVED

The statutory provision involved is Federal Rule of Civil Procedure 41(b) which provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

1. The Nature of the Case

This *pro se* personal injury action arises from Petitioner's unprovoked scissor attack on a fellow passenger on board Korean Air Flight No. KE026 from Seoul, Korea to New York on April 13, 1988. At the time of the scissor attack, Petitioner was experiencing bizarre hallucinations. After the attack, Petitioner was disarmed by KOREAN AIR cabin attendants and

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1 Numbers preceded by "App." refer to pages in the Appendix annexed to this Brief in Opposition.

other passengers and was handcuffed, bound and tied into a seat in the aircraft. Because of his continued violent and threatening behavior, the Captain of Flight KE026 made an emergency landing in Anchorage, Alaska where Petitioner was removed from the aircraft. Petitioner alleged that after he was subdued, an unidentified KOREAN AIR cabin attendant stabbed him in the leg and also attempted to suffocate him by stuffing a benzene-soaked rag into his mouth.

2. The Course of the Proceedings and Disposition in the Courts Below

Petitioner originally commenced this action on or about August 18, 1988 in the Civil Court of the City of New York, County of Kings. KOREAN AIR subsequently removed the action to the United States District Court for the Eastern District of New York on the grounds of diversity of citizenship jurisdiction and federal question jurisdiction in that the action was governed exclusively by a treaty of the United States.[2]

During a pretrial conference on October 22, 1990, the District Court scheduled trial of this action to commence on January 4, 1991 in the courthouse located in Uniondale, New York. App. 5a, 6a. On January 2, 1991, the District Court's courtroom deputy contacted Petitioner by telephone to ensure that he would be present at the scheduled trial. App.6a-7a. During that telephone conversation, Petitioner advised the deputy that "he could not come to Uniondale and he did not care what happened with the case." App. 7a. On that same day, the District Court's clerk sent to Petitioner, by Express Mail, written notification that he was required to be present at the trial on January 4, 1991 and advising him that his Complaint might be dismissed if he failed to appear. App. 7a-8a. Petitioner thereafter failed to appear for the trial on January 4,

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2 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934) *reprinted in* 49 U.S.C. App. § 1502 note (1976) (Warsaw Convention).

1991 and never attempted to contact the District Court to explain his absence. App. 4a-9a.

The District Court granted KOREAN AIR's oral Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 41(b) based upon Petitioner's refusal to appear at trial and his expressed intent to abandon his case. App. 9a. The District Court's Order dismissing the Complaint was entered on February 12, 1991. App. 3a. Petitioner appealed the dismissal order and on November 12, 1991, the Court of Appeals for the Second Circuit affirmed the District Court's Order. App. 1a.

REASONS WHY THE PETITION SHOULD BE DENIED

The District Court Properly Dismissed Petitioner's Complaint for Failure to Prosecute and Failure to Comply with its Order to Commence Trial of this Action and the Second Circuit Properly Affirmed

No reasons exist for the Court to consider this unintelligible Petition. This case involves the routine and proper exercise of the District Court's discretion to manage its docket after Petitioner's deliberate and unjustified refusal to appear for trial. The Second Circuit's Order affirming the District Court is not in conflict with the decisions of any other United States Court of Appeals and no special or important reason exists for granting the Petition.

Federal Rule of Civil Procedure 41(b) provides in pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

The District Court properly dismissed Petitioner's Complaint based upon Petitioner's failure to prosecute and his deliberate

and unjustified refusal to comply with the District Court's explicit Order to commence trial on January 4, 1991.

"The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629 (1962). "The primary rationale underlying a dismissal under 41(b) is the failure of plaintiff in his duty to process his case diligently. Plaintiff's duty of due diligence is imposed because of the strong policy favoring prompt disposition of cases. Prejudice to defendants resulting from unreasonable delay may be presumed." *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1982). The scope of review of an order of dismissal is confined "solely to whether the trial court has exercised its inherent power to manage its affairs within the permissible range of its discretion." *Id.*

The plaintiff is obligated to move his case to trial, "and should he fail to do so in a reasonable manner, his case may be dismissed with prejudice as a sanction for his unjustified conduct." *West v. City of New York*, 130 F.R.D. 522, 524 (S.D.N.Y. 1990). Dismissal of a plaintiff's Complaint repeatedly has been held to be proper when the plaintiff refuses to appear for trial. *See e.g., Ali v. A & G Co., Inc.* 542 F.2d 595 (2d Cir. 1976); *Theilmann v. Rutland Hosp. Inc.*, 455 F.2d 853 (2d Cir. 1972); *Betts v. Agri-Tech Servs. Inc.*, 130 F.R.D. 143 (D. Kan. 1990); *Huey v. Teledyne, Inc.*, 608 F.2d. 1234 (9th Cir. 1979), *cert. denied*, 458 U.S. 1106 (1982).

Petitioner was on notice since October 22, 1990 that trial of this action would commence on January 4, 1991. The District Court reminded Petitioner by telephone and mail two days before the trial that he was required to appear for trial and that his case could be dismissed if he failed to appear. Petitioner defied the District Court and refused to appear for trial.

Petitioner's deliberate, unjustified and unexplained defiance of the District Court's Order to appear for trial, and his expressed intent to abandon the prosecution of his case, justi-

fied the District Court's dismissal of his Complaint under Fed. R. Civ. P. 41(b). The Second Circuit's Order affirming the dismissal was proper and no special or important reason exists for granting the Petition.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Dated: New York, New York
August 20, 1992

Respectfully submitted,

DESMOND T. BARRY, JR.*
CHRISTOPHER CARLSEN
CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

Attorneys for Respondent
KOREAN AIR LINES CO., LTD.

*Counsel of Record

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

97-6260

November 12, 1991

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of November, one thousand nine hundred and ninety-one.

Present:

Hon. James L. Oakes, *Chief Judge*,
Hon. J. Edward Lumbard, Hon. Frank X. Altimari,
Circuit Judges.

WILLIAM BERNAL,

Plaintiff-Appellant,

—v.—

KOREAN AIR LINES,

Defendant-Appellee.

ORDER

William Bernal, *pro se*, appeals from an order of the United States District Court for the Eastern District of New York, Arthur D. Spatt, *Judge*, dismissing his personal injury claim,

with prejudice, pursuant to Federal Rule of Civil Procedure 41(b) for failure either to prosecute or to comply with the district court's order. For the reasons stated below, we affirm.

Appellant, in essence, argues that the district court's dismissal order constituted abuse of discretion. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1982). A review of the facts indicates that the district court went to great lengths to inform appellant of his trial date and of the consequences of his failure to appear. On October 22, 1990, appellant was informed that the trial would begin on January 4, 1991. On January 2, 1991, the district court's courtroom deputy telephoned appellant to remind him of the upcoming trial. At that time, appellant stated that "he would not come to [the courthouse in] Uniondale and he did not care what happened with the case". Appendix 6. To ensure that appellant was fully informed of the trial date and the consequences of failing to appear, the court, on January 2, also sent Express Mail letters to appellant's residence and place of work. The letters noted that dismissal might result if appellant failed to appear. Yet, on January 4, appellant failed to appear at trial and he offered no explanation for his absence. The district court could properly conclude from appellant's earlier statement and his unexplained absence at trial that appellant did not plan to go forward with his suit.

Affirmed.

/s/ _____
JAMES L. OAKES, Chief Judge

/s/ _____
J. EDWARD LUMBARD, Circuit Judge

/s/ _____
FRANK X. ALTIMARI, Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DTB 8066
88 CIV. 3042 (ADS)

WILLIAM BERNAL,

Plaintiff,

—against—

KOREAN AIR LINES,

Defendant.

ORDER

This cause came on to be heard on defendant's Motion to Dismiss the action pursuant to Federal Rule of Civil Procedure 41(b) for failure of plaintiff to prosecute the action and failure of plaintiff to comply with the Order of this Court made on October 22, 1990 and January 2, 1991 directing plaintiff to appear and proceed with the trial of this action commencing on January 4, 1991, and the Court having heard the argument of counsel, and it appearing to the Court that plaintiff has failed to prosecute this action with due diligence and failed to appear and proceed with the trial of this action in accordance with the terms of the aforesaid Order, it is

ORDERED, that this action be and is hereby dismissed with prejudice, without costs to defendant.

Dated: New York, New York
February 12, 1991

/s/ _____
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 88 3042
January 4, 1991

WILLIAM BERNAL,

Plaintiff,

—against—

KOREAN AIRLINES,

Defendant.

Before:

HONORABLE ARTHUR D. SPATT, U.S.D.J.

APPEARANCES:

For the Plaintiff: WILLIAM BERNAL, Pro se

For the Defendant: CONDON & FORSYTH, ESQS.
1251 Avenue of the Americas
New York, N.Y. 10020
By: CHRISTOPHER CARLSEN, ESQ.

Court Reporter: HARRY RAPAPORT, C.S.R.
U.S. District Courthouse
Two Uniondale Avenue
Uniondale, N.Y. 11553
(526) 485-6558

THE CLERK: Civil cause for jury selection, William Bernal against Korean Air Lines.

MR. CARLSEN: Good morning, your Honor. Christopher Carlsen from the firm of condon and forsyth, CARLSEN.

THE COURT: Did you see Mr. Bernal at all?

MR. CARLSEN: No, he is not here yet.

THE COURT: Have you communicated with him at all?

MR. CARLSEN: No, not since our last conference, your Honor.

THE COURT: My courtroom deputy communicated with him I believe on Wednesday. You were notified at a conference that we will be selecting a jury today; is that correct?

MR. CARLSEN: Yes.

THE COURT: And when did that conference take place? Do you recall?

MR. CARLSEN: I believe it was October 22. I am not sure of the date.

However, your Honor, I did receive a copy of your clerk's letter which was delivered to Mr. Bernal yesterday, I believe, by Federal Express. I received my copy of that letter yesterday by Federal Express, which I noted specifically directed him to appear in this courtroom at 9:30 this morning, as he had been directed at the prior conferences, and that if he failed to show up you would perhaps dismiss his case.

THE COURT: It said that I may dismiss the complaint.

MR. CARLSEN: Yes, sir.

THE COURT: He has not shown up apparently. And we called his place of business this morning, Mr. Carlsen. He had not appeared yet. He is supposed to be there at 10:00 o'clock this morning. And we will try to call him then. So, you will please standby. I will consider what remedy to take when I decide one way or another whether he is coming in or not and then we will put it on the record at that time.

MR. CARLSEN: Yes, sir.

THE COURT: So, we will call it again.

(Recess taken while other matters are taken up by the Court.)

THE CLERK: Civil cause for jury selection, CV 88 3042, William Bernal against Korean Airlines.

THE COURT: Is the plaintiff William Bernal present?

MR. CARLSEN: No, he is not, your Honor.

THE COURT: Do you know the plaintiff William Bernal?

MR. CARLSEN: Yes. I know what he looks like yes, sir.

THE COURT: Were you present at any other time when he was present?

MR. CARLSEN: Yes, sir. I have attended, your Honor, approximately four or five prior conferences in this case.

THE COURT: Were you the lawyer who argued the defendant's motion for summary judgment?

MR. CARLSEN; Yes, sir.

THE COURT: According to the record that I have, after I denied the defendant's motion for summary judgment there was a conference on July 5, 1990. Does that coincide with your record?

MR. CARLSEN: Yes, sir.

THE COURT: At that conference settlement negotiations took place and the plaintiff's settlement demand was eight million dollars as I recall. Do you recall that, Mr. Carlsen?

MR. CARLSEN: Yes, your Honor.

THE COURT: At that time I said that that settlement was impossible and we would have to try this case.

There was another conference on October 22, 1990. Were you present at that conference?

MR. CARLSEN: Yes, your Honor.

THE COURT: The plaintiff still wanted millions at that time. I then told the plaintiff and you that we would select a jury on January 4th, 1991, in Uniondale.

MR. CARLSEN: That's correct.

THE COURT: At that time Mr. Bernal stated he wanted me to leave the case in Brooklyn; do you recall that?

MR. CARLSEN: Yes, sir.

THE COURT: And I said, no. Because I am now out here 100 percent of the time. Previously I had been in Brooklyn up until completed a long criminal trial.

Then on Wednesday, January 2nd my good courtroom deputy, to make sure that everyone was going to be here called

the parties in various cases that were in to select a jury, including this case, and he spoke to Mr. Bernal.

Is that right, Mr. Zuniga?

THE CLERK: Yes, sir.

THE COURT: What did he say at that time?

THE CLERK: At that time he said he could not come to Uniondale and he did not care what happened with the case.

THE COURT: All right.

When we heard that message I had my equally good law clerk, Nelson A. Boxer, write a letter by express mail to Mr. William Bernal both at his home at 601 West 173rd Street, apartment 37, New York, New York 10032, and to his place of business at 300 Jay Street, Brooklyn, New York, 11201.

Where does he work? Is that the Transit Authority?

MR. CARLSEN: No, your Honor, I believe that's a university. He works in an audio visual department in some university.

THE CLERK: New York Technical College.

THE COURT: No wonder he liked the Brooklyn courthouse. That's across the street. He went across the street then.

Where is your office, Mr. Carlsen?

MR. CARLSEN: In Manhattan, your Honor, 50th Street.

THE COURT: You had to come from Manhattan also.

Well, we wrote this letter, Mr. Boxer did, and I will read it into the record, a rather good letter.

Dear Mr. Bernal, which was sent to both his home and office.

Judge Spatt asked me to inform you that he directs you to appear at the United States Courthouse, Uniondale Avenue at Hempstead Turnpike, Uniondale New York 11553 on Friday January 4, 1991, 9:30 a.m., to select a jury in the above captioned case, period.

At a pretrial conference on October 22, 1990, Judge Spatt scheduled jury selection to go forward on January 4th, 1991.

As a result Judge Spatt has also asked me to inform you that if you failed to appear for jury selection on January 4th, at 9:30 a.m. this is Friday, he may dismisses your complaint.

If you need any directions or information concerning the location of the United States Courthouse in Uniondale you can telephone the clerk's office at 516, 485-1701, period.

Very truly your, Nelson A. Boxer, Esquire, law clerk to Honorable D. Spatt, United States District Court.

Nelson, I like that letter. I like it because I saw it before it went out.

In any event we have no reason to believe that Mr. Bernal did not receive the letter. You received your letter, did you not?

MR. CARLSEN: Yes, your Honor.

THE COURT: How did you receive your copy?

MR. CARLSEN: By Federal Express on January 3rd, yesterday.

THE COURT: What time did you receive it approximately?

MR. CARLSEN: I am not sure what time it got to my office. It landed on my desk about 3:00 o'clock.

THE COURT: Your office is in Manhattan, so I assume Mr. Bernal received it both at his office and his home or certainly one of these places. And especially in view of the fact that he told my deputy clerk he is not coming to Uniondale or can't get to Uniondale and doesn't care what happens to the case; that is a clear indication or evidence of abandonment of this case.

Under the circumstances here what is your application, Mr. Carlsen?

MR. CARLSEN: Your Honor, on behalf of Korean Airlines we would move to dismiss plaintiff's complaint in its entirety against Korean Air, under Rule 41(b), based on plaintiff's failure to prosecute this case, his articulated intention to abandon it, and also his express disobedience of this Court's order and directions directing him expressly to be here today. Korean Airlines is here and ready to go to trial. We have our witnesses here.

THE COURT: Do you have witnesses here?

MR. CARLSEN: Yes, your Honor, I have one witness in the courtroom now. I also have two that are leaving for Korea tomorrow morning. If I call them I can prevent them from getting on the plane. But I have one witness in the courtroom.

THE COURT: Who is the witness?

MR. CARLSEN: Mr. Roberts Composa. He was a passenger on the plane who helped to restrain and subdue Mr. Bernal during the scissors attack event.

THE COURT: The Court having reviewed already for the record the fact that I directed Mr. Bernal to be here for the selection of the jury orally on October 22, 1990; that I further had my deputy courtroom clerk deputy direct him to be here, and that was done on Wednesday; that he further stated that he is not coming to Uniondale or can't get to Uniondale and doesn't care what happens to the case, which is evidence of an intentional abandonment of his rights in this occasion, and, further, with respect to the letter that was sent to him by Federal Express directing him to be present, and stating that I may dismiss the complaint, I find that there has been a failure on the part of the plaintiff both to prosecute this action, move it along, and to comply with a direct order of the Court. Therefore, your motion to dismiss this complaint based upon all these factual predicates is granted.

You are to submit an order on notice.

MR. CARLSEN: Yes. Thank you, your Honor.

THE COURT: I also want to add for the record—no, that's sufficient. Thank you very much.

MR. CARLSEN: Yes, sir.

(END OF PROCEEDINGS.)